SUPREME COURT, U. S.

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MICHAEL RODAK, JR., C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-130

MOTORISTS MUTUAL INSURANCE COMPANY,
Petitioner,

v.

TERESA SIMPSON, ADMINISTRATRIX, *et al.*,
Respondents.

PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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1. Introduction

In this case, the court below affirmed a judgment of a federal district court under circumstances that deprived Petitioner ("Motorists") of any meaningful adjudication of the issues in the litigation and fail to meet the threshold standard, as stated in this Court's Rule 19 (b), of general consistency with the "accepted and usual course of judicial proceedings." Specifically, the Petition addressed (1) the court's determination that the district's court's instruction on the critical issue of "bad faith" incorporated the particular elements that the court below admitted to be required under applicable law, despite the failure of the challenged instruction to include any of those particular elements; (2) the court's action,

in denying rehearing, of deleting a sentence in its original opinion that had explained—by misstating the record—its reason for affirming the exclusion of Motorists' primary evidence on the "bad faith" issue; and (3) the court's basing its affirmance in large part on a finding of fact that was not at issue in the district court and that is without any rational support in the record.

Respondent's Brief in Opposition consists in substantial part of unusually strident characterizations of Motorists' Petition and its conduct throughout this litigation, which require no comment. Respondent also relies upon erroneous characterizations of the record that do deserve brief comment, even though they do not relate, for the most part, to the specific issues raised in the Petition. They deserve comment only because they further illustrate that the court below decided this case not upon the record as it existed but upon the record as Respondent erroneously described it. Finally, Respondent contends that the petition must be denied because of the " 'Rule of Two' " (Brief at 1, 19) and because this Court's Rule 23 is asserted to require the attachment to the Petition of opinions below as published by the West Publishing Company rather than, as the Rule appears to state, the opinions "delivered upon the rendering of the judgment or decree sought to be reviewed . . . ." Rule 23(1)(i).[1]

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[1] Respondent also contends that it was "deceiving and improper" (Brief at 20) for Motorists to make arguments based upon the opinions filed by the court rather than restricting its arguments to the language of the opinion as ultimately published at 494 F.2d 850. We suggest that our Petition made completely clear that the published opinion, which we cited, differed from the slip opinion only in one respect—the deletion of one sentence from the slip opinion filed by the court (App. A to Petition), for the reasons stated in the court's order denying rehearing (App. C to Petition). Indeed, we devoted substantial space to discussing that single difference between the opinion filed by the court and the opinion as ultimately published. See Petition at 9-10, 15.

2. Inapplicability of the "Rule of Two"

Respondent's reliance upon what she calls the Rule of Two is misplaced. We have no quarrel with the statement that this Court is extremely reluctant to review findings of fact made by a trial court and affirmed on appeal, though, contrary to Respondent's statement that the Court *never* has done so (Brief at 19), in fact the Court on many occasions has deemed it necesary "to make an independent examination of the whole record" despite a previous appellate affirmance of trial court findings. *Edwards* v. *South Carolina*, 372 U.S. 229, 235 (1963).[2] If this were a case in which the findings at issue had been made by a court or jury and then affirmed by the court below, we would argue that the absence of any support in the record for those findings brought the case within the recognized exception to this Court's general deference to the consistent findings of two courts. But this is not such a case. The only finding of fact that we presented as an issue for review was the finding of the court below that Motorists' "bad faith" was shown by its obtaining a statement from the driver of the insured automobile, Mr. Penman, when he was under sedation. In our Petition (pp. 11-13, 16-17), we showed in some detail not only that there is no support in the record for that finding but also that the issue of Penman's condition when the statement was taken was not even an issue at the trial. Indeed, that was the point of our argument—the "sedation" finding of the court below came not on a review of the evidence relevant to the issues presented by Respondent's complaint and the district

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[2] See also *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 284-292 (1964); *Garner* v. *Louisiana*, 368 U.S. 157 (1961); *Blackburn* v. *Alabama*, 361 U.S. 199, 205 n.5 (1960); *Washington* v. *United States*, 357 U.S. 348 (1958) (summarily reversing, for insufficiency of evidence, a judgment of the Seventh Circuit that affirmed a conviction on the basis that the evidence *was* sufficient).

court's instructions. Rather, that issue first appeared in the court below.

Respondent's Brief does not contend that Penman's condition at the time of his statement was an issue presented at the trial, nor does it in any way question our rather detailed analysis of the record (Petition at 11-12) showing the complete absence of any basis for a conclusion that the Penman statement was taken while he was under sedation.[3] In fact, Respondent characterizes that matter as "a minor evidentiary fact in the case" and a "small detail" (Brief at 14-15) that "never has been a fact of importance in this case." (Brief at 23) Unquestionably that is true as to the trial. Respondent also argues that it is true as to the appeal, however, and that simply is not so. We need not argue the point further, since one need only look at the court's opinion (App. A to Petition) in discussing the "evidence" of bad faith to determine the critical nature of that finding.

3. Respondent's Description of the Record

One further point should be made as to Respondent's discussion of the Penman statement. Respondent refers to the conduct of the insurance adjuster who interviewed Mr. Penman and took the statement as follows:

> "[his] sly insertion of 'I asked Sylvester if I could use his 1960 Oldsmobile to take a girl out . . .' contrasts with the sworn testimony of both Penman and Griffin that nothing was said about Penman's reason for asking for the car or his intentions for using it. (Tr. I, pp. 24, 27, 28, 30, 36, 41)." Brief, at 14.

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[3] Respondent does speculate that the jury might properly have concluded that Penman was sedated, merely because Penman "was certainly badly injured, hospitalized, and emotionally distraught because of the tragedy . . . ." (Brief at 13). Respondent does not support that speculation by any references to the record, because there are none, except with respect to Penman's brief hospitalization (see Petition at 12).

The court below also found in its opinion that "Penman did not state the purpose for which he intended to use the car, nor did Griffin place any limitation on its use" (App. A to Petition, at 4a), quoting almost verbatim from Respondent's brief in that court. We did not raise that finding as an issue in the Petition, even though it was critical on the issue of the scope of permission and thus policy coverage. Since Respondent seeks to make an issue of it, however, we note it now as an example of the adjudicative procedure of the court below, which was to decide the case in accordance with Respondent's highly inaccurate description of the record.

One may look in vain at the first five transcript pages cited by Respondent for any reference to Penman's language in asking Mr. Griffin for the use of his automobile. At the last reference, transcript page 41, the record is precisely the opposite of what Respondent suggests and what the court below found:

> "Q [by Respondent] What did he say to you and what did you say to him at that time?
> "A [by Mr. Griffin] Well he asked me to take a friend home and I gave him permission to take her home."

One reason that Penman's hospital statement was not an issue at the trial was that its contents, especially including the point raised by Respondent, were corroborated by Griffin's unsworn statement to Motorists taken two days earlier (Tr. at 97-8) and also by the later sworn testimony of both Penman and Griffin on numerous occasions.[4] Indeed, the district court in this case, in dis-

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[4] Griffin's written statement to Motorists (Tr. 97-100) was made on October 4, 1965, when he filed a proof of claim. Respondent insists that Griffin's claim listed Penman as a "resident of his household" (Brief at 16-17), so that Motorists knew from the first that Penman was covered. That simply is not so. Griffin's statement said that, about six days before the accident, Penman "came

cussing instructions, stated, "Well, I thought the testimony was all centered towards the fact that he [Penman] said to Mr. Griffin, 'May I use your car to take Ann Barrier [sic] home?'" (Tr. II, at 17). And the district court (N.D. Ind.) in its opinion in the prior Declaratory Judgment Case found that "Penman asked Griffin whether he could borrow Griffin's car 'to take Ann Berry home.'" (App. D to Petition, at 22a). The sworn testimony read to the jury in this case included Penman's following answer to a question by Respondent as to the circumstances under which he obtained the automobile:

> "A Well I asked Mr. Sylvester could I use his car to take Ann home.
> "Q Ann, meaning whom?
> "A Ann Berry." (Tr. at 124)

That sworn testimony also included another answer by Penman, on another occasion, to the same question by Respondent:

> "A I told him some girl there, she wanted to go home, so I asked could I use his car. He told me 'yes,' so I left.
> "Q What was the girl's name? Do you remember?
> "A Ann." (Tr. at 111).

Further, that sworn testimony included repeated testimony by Mr. Griffin that Penman had asked him to use the car for the specific purpose of taking Ann Berry to her nearby home (Tr. at 41, 98, 117, 132, 133) and that Griffin had told a policeman on the day after Penman's accident that "I told him [the Officer] that I let him [Penman] have my car to go take a girl home. I did not give him permission to take my car out of town." (Tr.

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to stay with us temporarily. He was just discharged after having spent ten years in the United States Navy. He is married, his wife is in California. He was planning to reenlist in the Navy." (Tr. 97-8). See also Petition at Appendix E.

at 107). Should there be any question remaining about the exact nature of the Penman request, as shown by the record here, Mr. Griffin's sworn testimony included the following:

> "Q Now, Mr. Griffin, would you tell the Court exactly what conversation occurred in connection with your lending your car to Mr. Penman? I am referring to the evening of October 1, 1965, before this accident. Would you tell the Court what Mr. Penman, if anything, said to you and what, if anything, you responded to him?
>
> "A Mr. Penman asked me could he take Ann home. Excuse me, he asked me could he use my car to take Ann home and I told him 'yes.'" (Tr. at 117).

The short of the matter is that, with respect to the above quotations from the opinion of the court below and from Respondent's Brief in this Court, see p. 5, *supra*, there are two very different cases here. One case comprises the facts presented by the record in the district court and the other case comprises the "facts" stated, with consistency, by Respondent and by the opinion of the court below. The burden of our position simply is that an appellate court is bound to decide only the case presented by the record.[5]

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[5] As to other "factual" assertions by Respondent (Brief at 15-16), Motorists' letters to Penman advised him of the exact terms of Respondent's settlement offer on the day that Motorists received that offer, advised him that Respondent claimed $400,000 in damages from him, advised him that Motorists would not pay any judgment against him, and advised him that, because of his heavy personal exposure, he was entitled to retain his own attorney to defend him (Tr. 43-51). Penman neither sought any information from Motorists nor responded to any letters from Motorists (Tr. 204).

4. The Instruction on Bad Faith

In responding to our arguments concerning the instruction on the central issue of "bad faith" (Petition at 8-9, 15-16), Respondent contends that Motorists is guilty of a "revolting misrepresentation" in that it did not ask for an instruction incorporating the specific elements of bad faith stated repeatedly by the Ohio Supreme Court and, moreover, that Motorists did not object to the instruction given by the district court on the ground that it failed to incorporate those elements. (Brief at 9-11, 22). As to the first point, Respondent quotes the instruction requested by Motorists (Brief at 11, n.3) and the elements required by the Ohio Supreme Court to be included in an instruction as to the meaning of "bad faith," and it is necessary only to compare the language to see the virtual identity of the two. As to the second point, we note that the court below did not suggest that Motorists failed adequately to object to the instruction, perhaps because the record shows that Motorists *did* object to the instruction on the ground that it did not make clear the meaning of "bad faith" as defined "under the law of Ohio" and as accurately defined in "Defendant's instruction number seven." (Tr. II at 54). In stating that Motorists objected only on the ground that the instruction presumed the non-existence of a coverage question, Respondent cites the following page—55—of the instruction transcript (see Brief at 10), which does indeed contain that objection. That objection begins at the bottom of page 54, however, with the words, "*Further*, the instruction in . . . ." (Emphasis added.)

5. Exclusion of The Declaratory Judgment

Concerning the action of the court below in excluding evidence of the judgment in the Declaratory Judgment action and of Respondent's admissions regarding that judgment, Respondent's arguments are as follows: (a) it

was "improper" for Motorists' to point out that the court, in entering its judgment, filed an opinion (App. A to Petition) that affirmed the exclusion on a ground that it later deleted from the opinion in denying rehearing (App. C to Petition), since Petitioner is permitted only to discuss the "official" opinion as published by the West Publishing Company (Brief at 20); (b) the 1877 case of *Donellan* v. *Hardy*, 57 Ind. 393, holds that a judicial opinion itself is inadmissible as evidence to prove a fact; and (c) the only acceptable method of proving the fact of a judgment or a judicial opinion is by calling the Judge as an expert witness (Brief at 8). *Donellan* v. *Hardy* in fact held that, in order to prove the fact of a judgment of the Indiana Supreme Court in a related case by competent evidence, a party must offer the best evidence—a certified copy of the opinion and judgment from the court records—rather than secondary evidence —the opinion as printed in the Indiana Reports, and therefore the printed opinion was inadmissible. 57 Ind., at 402-3. In short, the *Donellan* case lends support for the *admissibility* of the judgment as offered by Petitioner and also is inconsistent with Respondent's novel theory that a judicial opinion or judgment does not become "final" and "official" unless and until it is printed in a book. See also *Public Service Company of Indiana* v. *Hamil*, 416 F.2d 648, 653 (7th Cir. 1969) (dissenting opinion of a state court was "evidence" that agency action found unlawful by majority was not "arbitrary").

It should be noted that the court below did not base its affirmance on the arguments made here by Respondent, which it also made there. Had the court accepted those arguments, we would now be in a position to say only that the court rather clearly erred on the law of evidence, which would not justify this Court's exercise of its supervisory power. Our point in the Petition (Petition at 9-11, 14-15) was that the court's treatment of that issue was

not only wrong but also arbitrary, and it is that arbitrary treatment of Motorists that justifies this Court's grant of certiorari and summary reversal of the judgment below.

CONCLUSION

For the reasons stated above and in the Petition, a writ of certiorari should be granted and the judgment of the court below should be summarily reversed.

Respectfully submitted,

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